CHAPTER 10

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I. BACKGROUND.

A. The Contract Disputes Act of 1978 (CDA) was one of the first forms of alternate dispute resolution (ADR) specifically devised for contract disputes. The CDA requires the Boards of Contract Appeals (BCA) to "provide to the fullest extent practicable, informal, expeditious, and inexpensive resolution of disputes." 41 U.S.C. § 607(e).

1. The CDA was designed to encourage the resolution of contract disputes by negotiation prior to the onset of formal litigation. S. Rep. No. 95-1118.

2. The CDA favors negotiation between the contractor and the agency at the claim stage, before litigation begins. At this stage the agency is typically represented by the contracting officer, who makes the initial decision on a contractor's claim. If the dispute cannot be resolved between the contractor and the contracting officer, the CDA requires the contracting officer to issue a final decision. The contractor can then appeal this final decision to either a Board of Contract Appeals or the Court of Federal Claims. 41 U.S.C. § 605; FAR 33.206 and 33.211.

3. Following enactment of the CDA, it became clear that Congress' goal of providing an inexpensive method for contractors to pursue appeals had not been realized. The judicialized rules of practice and procedure followed by the Boards, combined with the complex nature of many contract claims, resulted in appeals as time-consuming as litigation in federal court.

B. Administrative Disputes Resolution Act of 1990. (ADRA). By the end of the 1980s, Congress found that "administrative proceedings had become increasingly formal, costly, and lengthy resulting in unnecessary expenditures of time and in a decreased likelihood of achieving consensual resolution of disputes." ADRA, Pub. L. No. 101-552, § 2(2), 104 Stat. 2738 (1990).

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1. Congress decided that ADR, used successfully in the private sector, would work in the public sector and would "lead to more creative, efficient and sensible outcomes." ADRA, Pub. L. No. 101-552, § 2(3) and (4), 104 Stat. 2738 (1990).

2. The ADRA explicitly authorized federal agencies to use ADR to resolve administrative disputes, including contract disputes. ADRA, Pub. L. No. 101-552, § 4(a), 104 Stat. 2738 (1990).

3. Under the ADRA, ADR was defined as any procedure used, in lieu of adjudication, to resolve issues in controversy, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, or any combination of these techniques. ADRA, Pub. L. No. 101-552, § 4(b), 104 Stat. 2738 (1990).

C. On October 19, 1996, Congress enacted the Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, 110 Stat 3870, amending 5 U.S.C. §§ 571-584 (see also Federal Acquisition Circular 97-09, 63 Fed. Reg. 58,586 (Final Rules) (1998), amending the FAR to implement the ADRA)). The Act:

1. permanently authorized the ADRA;

2. redefined ADR as procedure used to resolve issues in controversy, including, but not limited to, conciliation, facilitation, mediation, factfinding, minitrials, arbitration, and use of ombuds, or any combination of these techniques;

3. eliminated the right of federal agencies to opt out of arbitration decisions with which they disagreed;

4. exempted dispute resolution communications relative to ADR from disclosure under the Freedom of Information Act;

5. authorized an exception to full and open competition for the purpose of contracting with a "neutral person" for the resolution of any existing or anticipated litigation or dispute; and

6. required the President to designate an agency or establish an interagency committee to facilitate and encourage the use of ADR. By Presidential Memorandum dated 1 May 1998, the Interagency Alternative Dispute Resolution Working Group was established. See http://www.adr.gov.

D. Federal Acquisition Regulation. It is now the government's express policy to attempt to resolve all contract disputes at the contracting officer level. Agencies are encouraged to use ADR procedures to the "maximum extent practicable." FAR 33.204.

1. FAR 33.214(a) identifies four essential elements for the use of ADR techniques:

a. existence of an issue in controversy;

b. voluntary election by both parties to participate in the ADR process;

c. agreement to ADR and terms to be used in lieu of formal litigation; and

d. participation in the process by officials of both parties who have authority to resolve the issue in controversy.

2. If the contracting officer rejects a contractor's request for ADR, the contracting officer must provide the contractor a written explanation citing one or more of the conditions in 5 U.S.C. 572(b) or other specific reasons that ADR is inappropriate. FAR 33.214. Additionally, when a contractor rejects an agency ADR request, the contractor must inform the agency in writing of the contractor's specific reasons for rejecting the request. FAR 33.214.

E. DOD Policy and Implementation. Each DOD component shall use ADR techniques "whenever possible" and shall establish ADR policies and programs. DOD Dir. 5145.5.

1. Army. Pursuant to DOD Dir. 5145.5 and a Secretary of the Army issued policy memo, "Army personnel are urged to use ADR procedures in appropriate cases." Memorandum, Secretary of the Army, subject: Implementation of the ADRA of 1990 (July 25, 1995). The Army's ADR program is implemented through subordinate commands, for example Contract Appeals Division, Corps of Engineers, and Army Materiel Command. See ADR Policies and Procedures Guide, available at http://www.jagcnet.army.mil/cad.

2. Air Force. The Air Force institutionalized its use of ADR by issuance of a comprehensive policy on dispute resolution entitled "ADR First." The policy states that ADR will be the first-choice method of resolving contract disputes if traditional negotiations fail and it represents an affirmative determination to avoid the disruption and high cost of litigation. ADR: Air Force Launches New ADR Initiative; Drafts Legislation to Fund ADR Settlements, Fed. Cont. Daily (BNA) (Apr. 28, 1999); see also Air Force Policy Directive 51-12 (Jan. 9, 2003) and AFFARS 5333.090.

3. Navy. The first Department of Navy ADR policy was issued in 1987, stating "every reasonable step must be taken to resolve disputes prior to litigation." Memorandum, Assistant Secretatry of the Navy (Shipbuilding and Logistics), subject: Alternative Dispute Resolution (1987). The current Navy policy states ADR shall be used to the maximum extent practicable with the goal of resolving disputes at the earliest stage feasible, by the fastest and quickest means possible, and at the lowest possible organizational level. SECNAVINST 5800.13 (Dec. 11, 1996).

II. DISPUTE RESOLUTION CONTINUUM.

A. Range. Alternative dispute resolution techniques exist within a dispute resolution continuum, ranging from dispute avoidance to litigation. The purpose of any ADR method is to settle the dispute without resorting to costly and time-consuming litigation before the courts and boards.

B. Dispute Avoidance (Partnering).

1. A process by which the contracting parties form a relationship of teamwork, cooperation, and good faith performance. It is a long-term commitment between two or more parties for the purpose of achieving mutually beneficial goals.

2. Partnering fosters communication and agreement on common goals and methods of performance. Examples of common goals are:

a. the use of ADR and elimination of litigation;

b. timely project completion;

c. high quality work;

d. safe workplace;

e. cost control;

f. value engineering;

g. reasonable profit.

2. Partnering is NOT:

a. Mandatory. It is not a contractual requirement and does not give either party legal rights. The parties must voluntarily agree to the process, because it is a commitment to an on-going relationship.

b. A "Cure-All." Reasonable differences will still occur, but one of the benefits of partnering is that it ensures the differences are honest and in good faith.

3. Implementing Partnering. Although voluntary, partnering is typically implemented through formal, specific methods that the parties agree upon.

a. Requires commitment of top management officials of all parties.

b. Parties need to establish clear lines of communication and responsibility, and agree to ADR methods for resolving legitimate disagreements.

c. In the Air Force, for all acquisition categories (ACAT) I and II programs (i.e., major weapons systems), contracting officers "shall establish an agreement between the Government and the contractor, " outlining the parties' intentions with respect to ADR. AFFARS 5333.214.

d. For examples of corporate-level ADR agreements, see the Air Force ADR Reference Book, section 1.3.2 available at http://www.adr.af.mil/acquisition/index.html.

C. Unassisted Negotiations.

1. In traditional unassisted negotiation, the parties attempt to reach a settlement without involvement of outside parties.

2. Elements of Successful Negotiation:

a. Parties identify issues upon which they differ.

b. Parties disclose their respective needs and interests.

c. Parties identify possible settlement options.

d. Parties negotiate terms and conditions of agreement.

3. Goal: Each party should be in a better position than if they had not negotiated.

D. ADR Procedures. Defined broadly to include any procedure or combination of procedures that "may include, but are not limited to, conciliation, facilitation, mediation, fact-finding, mini-trials, arbitration, and use of ombudsmen," ADR techniques rely upon participation by a third-party neutral. See FAR 33.201. Typically ADR types fall within one of three general categories:

1. Process Assistance/Assisted Negotiations:

a. Mediation. Mediation is helpful when the parties are not making progress negotiating between themselves. Mediation is simply negotiation with the assistance of a third party neutral who is an expert in helping people negotiate but has no decision-making authority. See "Alternative Dispute Resolution – Edition III," Briefing Papers No. 03-5, p. 1 (April 2003).

(1) The mediator should be neutral, impartial, acceptable to both parties, and should not have any decision making power.

(2) A professional mediator will normally approach a dispute with a formal strategy, consisting of a method of analysis, an opening statement, recognized stages of mediation, such as ex parte caucuses, and a variety of mediation tools for breaking impasses and bringing about a resolution.

(3) Mediators (as well as arbitrators and other neutrals) may be retained without full and open competition. FAR 6.302-3(a)(2)(iii) and (b)(3). Moreover, third-party neutral functions (like mediating and arbitrating) in ADR methods are not inherently governmental functions for which agencies may not contract. See FAR 7.503(c)(2).

(4) At the ASBCA, the process is known as the "settlement judge technique." A flexible procedure that has the parties make case presentations to each other in the presence of an ASBCA judge, who then facilitates settlement negotiations. "Alternative Dispute Resolution at the ASBCA," Briefing Papers No. 00-7, p. 7 (June 2000).

b. Mini-Trials. The term "mini-trial" is a misnomer, as it is NOT a shortened judicial proceeding. In a mini-trial, the parties present either their whole case, or specific issues, to a panel in an abbreviated hearing. An advantage of the mini-trial is it forces the parties to focus on a dispute and settle it early.

(1) Mini-trials have been used by the Army Corps of Engineers in several cases. The first was the Tennessee Tombigbee Construction, Inc. in 1985. In that case, Professor Ralph Nash served as the neutral advisor, and a $17.25 million settlement was worked out between the government and the contractor. See 44 Federal Contracts Reporter (BNA) 502 (1985).

(2) Participants in a mini-trial include the principals, the parties' attorneys, and witnesses. The principals may choose to employ a neutral advisor.

(3) In a mini-trial, the attorneys engage in a brief discovery process and then present their case to a specially constituted panel. The panel consists of party principals, and the neutral advisor if desired.

(a) Each party selects a principal to represent it on the panel. The principal should have sufficient authority permitting unilateral decisions regarding the dispute and should not have been personally or closely involved in the dispute.

(b) The parties should jointly select the neutral advisor, and share expenses. The neutral advisor should possess negotiation and legal skills, and if the issues are highly technical, a technical expert is desirable.

(c) The neutral advisor may perform a number of functions, including answering questions from the principals, questioning witnesses and counsel to clarify facts and legal theories, acting as a mediator and facilitator during negotiations, and generally presiding over the mini-trial to keep the parties on schedule.

(4) After hearing the case, the principals try to negotiate a settlement. If an impasse, the neutral advisor may try to mediate a solution. If the advisor is an ASBCA judge, they may discuss the likely outcome if the case were to go to court or the board.

2. Outcome Prediction.

a. Non-Binding Arbitration. This form of arbitration aids the parties in making their own settlement. It is best used when senior managers do not have time to sit through a mini-trial and when disputes are highly technical.

(1) Normally an informal presentation of the case, done by counsel with client input.

(2) Evidence is presented by document, deposition, and affidavit.

(3) Few live witnesses.

(4) The arbitrator's decision or opinion, sometimes called an award, serves to further settlement discussions. The parties get an idea of how the case may be decided by a court or board.

(5) The arbitrator may also evolve into the role of a mediator after a decision is issued.

b. For bid protests at GAO, parties frequently utilize an "outcome prediction" conference, in which a GAO staff attorney advises the parties as to the perceived merits of the protest in light of the case facts and prior GAO decisions. See Tyecom, Inc. B-287321.3; B-287321.4, April 29, 2002.

3. Private Adjudication.

a. Binding Arbitration. Binding arbitration is the ADR technique that most closely resembles traditional, formal litigation. "Alternative Dispute Resolution – Edition III," Briefing Papers No. 03-5, p. 2 (April 2003). This form of arbitration results in an award, enforceable in courts.

(1) Normally a formal presentation of the case, much like a trial, though strict rules of evidence may not be followed.

(2) Evidence is presented by document, deposition, affidavit, and live witnesses, with full cross-examination.

(3) Arbitration panels consist of one to three arbitrators, who serve to control the proceeding, but do not take an active role in the case presentation.

(4) Private conversations between the parties and the arbitrators are forbidden. This is much different than mediation, during which private conversations between a party and the mediator are not uncommon.

(5) The arbitrator has full responsibility for rendering justice under the facts and law.

(6) The arbitrator's award is binding, so the arbitrator must be more careful about controlling the parties' case presentation and the reliability of the evidence presented.

b. Summary Trial with Binding Decision. In practice before the ASBCA, a summary trial results in a binding decision. The parties try the case informally before a board judge on an expedited, abbreviated basis. "Alternative Dispute Resolution at the ASBCA," Briefing Papers No. 00-7, p. 5 (June 2000). DOD personnel are not currently authorized to use a binding ADR method that does not involve the ASBCA. See the Air Force ADR Reference Book, section 4.3.1 available at http://www.adr.af.mil/acquisition/index.html.

III. TIME PERIODS FOR USING ADR.

A. Before Protest or Appeal.

1. Protests. The FAR has long provided authority for agencies to hear protests. FAR 33.103 implements Executive Order 12979 and requires agencies to:

a. Emphasize that the parties shall use their best efforts to resolve the matter with the contracting officer prior to filing a protest (FAR 33.103(b));

b. Provide for inexpensive, informal, procedurally simple, and expeditious resolution of protests, using ADR techniques where appropriate (FAR 33.103(c));

c. Allow for review of the protest at "a level above the contracting officer" either initially or as an internal appeal (FAR 33.103(d)(4)) and,

d. Withhold award or suspend performance if the protest is received within 10 days of award or 5 days after debriefing. FAR 33.103(f)(1)-(3). But an agency protest will not extend the period within which to obtain a stay at GAO, although the agency may voluntarily stay performance. FAR 33.103(f)(4).

2. Appeals. The ADRA provides clear and unambiguous government authority for contracting officers to voluntarily use any form of ADR during the period before an appeal is filed. 5 U.S.C. § 572(a); FAR 33.214(c).

B. After Protest or Appeal.

1. The GAO Bid Protest Regulations now provide that GAO, on its own or upon request, may use flexible alternative procedures to resolve a protest, including ADR procedures. 5 C.F.R. 21.10. As noted earlier, parties frequently utilize an "outcome prediction" conference. See Tyecom, Inc. B-287321.3; B-287321.4, April 29, 2002.

2. With respect to contractor claims, once an appeal is filed, jurisdiction passes to the BCA. When an appeal is filed, the Board gives notice suggesting the parties pursue the possibility of using ADR, including mediation, mini-trials, and summary hearings with binding decisions. The ASBCA has made aggressive use of ADR services in contract appeals disputes. See "Alternative Dispute Resolution at the ASBCA," Briefing Papers No. 00-7 (June 2000).

3. Parties who file appeals with the Court of Federal Claims (COFC) will also be informed of voluntary ADR methods available through the court. In 2001 COFC began an ADR pilot program, in which some cases are assigned simultaneously to an ADR judge. See Notice of ADR Pilot Program, at http://www.contracts.ogc.doc.gov/fedcl/docs/adr.html. The goal of the pilot program is to determine whether early neutral evaluation by a settlement judge will help parties understand their differences and their prospects for settlement.

IV. APPROPRIATENESS OF ADR.

A. When is it appropriate to use ADR? Agencies "may use a dispute resolution proceeding for the resolution of an issue in controversy that relates to an administrative program, if the parties agree to such proceeding." 5 U.S.C. § 572(a). Also, government attorneys are to "make reasonable attempts to resolve a dispute expeditiously and properly before proceeding to trial." Exec. Order No. 12988, § 1(c). Generally, ADR is appropriate for a case when:

1. Unassisted negotiations have failed to resolve the dispute and have reached an impasse;

2. Neither party is looking for binding precedent;

3. The parties wish to preserve a continuing relationship;

4. Confidentiality is important to either or both sides.

B. When is it inappropriate to use ADR? An agency should consider against using ADR when:

1. A definitive or authoritative resolution of the matter is required for precedential value, and an ADR proceeding is not likely to be accepted generally as an authoritative precedent. 5 U.S.C. § 572(b)(1);

2. The matter involves or may bear upon significant questions of Government policy that require additional procedures before a final resolution may be made, and an ADR proceeding would not likely serve to develop a recommended policy for the agency. 5 U.S.C. § 572(b)(2);

3. Maintaining established policies is of special importance, so that variations among individual decisions are not increased and an ADR proceeding would not likely reach consistent results among individual decisions. 5 U.S.C. § 572(b)(3);

4. The matter significantly affects persons or organizations who are not parties to the proceeding. 5 U.S.C. § 572(b)(4);

5. A full public record of the proceeding is important, and an ADR proceeding cannot provide such a record. 5 U.S.C. § 572(b)(5); or,

6. The agency must maintain continuing jurisdiction over the matter with authority to alter the disposition of the matter in light of changed circumstance, and an ADR proceeding would interfere with the agency's ability to fulfill that requirement. 5 U.S.C. § 572(b)(6).

V. STATUTORY REQUIREMENTS AND LIMITATIONS.

A. Voluntariness. ADR methods authorized by the ADRA are voluntary, and supplement rather than limit other available agency dispute resolution techniques. 5 U.S.C. § 572(c).

B. Limitations Applicable to Using Arbitration.

1. Arbitration may be used by the consent of the parties either before or after a controversy arises. The arbitration agreement shall be:

a. in writing,

b. submitted to the arbitrator,

c. specify a maximum award and any other conditions limiting the possible outcomes. 5 U.S.C. § 575(c)(1) and (2).

3. The Government representative agreeing to arbitration must have express authority to bind the Government. 5 U.S.C. § 575(b).

4. Before using binding arbitration, the agency head, after consulting with the Attorney General, must issue guidance on the appropriate use of binding arbitration. 5 U.S.C. § 575(c); see also DFARS Case 97-D304.

5. An agency may not require any person to consent to arbitration as a condition of entering into a contract or obtaining a benefit. 5 U.S.C. § 575(a)(3).

6. If a contractor rejects an agency request to use ADR, the contractor must notify the agency in writing of the reasons. FAR 33.214(b).

7. Once the parties reach a written arbitration agreement, however, the agreement is enforceable in Federal District Court. 5 U.S.C. § 576; 9 U.S.C. § 4.

8. An arbitration award does not become final until 30 days after it is served on all parties. The agency may extend this 30-day period for another 30 days by serving notice on all other parties. 5 U.S.C. § 580(b)(2).

9. A final award is binding on the parties, including the United States, and an action to enforce an award cannot be dismissed on sovereign immunity grounds. 5 U.S.C. § 580(c).

   a. This provision, enacted as part of the 1996 ADRA, put to rest for the time being a long-standing dispute as to whether an agency can submit to binding arbitration.

   b. DOJ's Historical Policy. The Justice Department had long opined that the Appointments Clause of Article II provides the exclusive means by which the United States may appoint its officers. DOJ's opinion was that only officers could bind the United States to an action or payment. Because arbitrators are virtually never appointed as officers under the Appointments clause, the government was not allowed to participate in binding arbitration.

   c. DOJ's Present Position. However, DOJ has now opined that there is no constitutional bar against the government participating in binding arbitration if:

      (1) the arbitration agreement preserves Article III review of constitutional issues; and

      (2) the agreement permits Article III review of arbitrators' determinations for fraud, misconduct, or misrepresentation. DOJ also points out that the arbitration agreement should describe the scope and nature of the remedy that may be imposed and that care should be taken to ensure that statutory authority exists to effect the potential remedy.

   d. Judicial Interpretation. The Court of Federal Claims has found DOJ's memorandum persuasive and agreed that no constitutional impediment precludes an agency from submitting to binding arbitration. Tenaska Washington Partners II v. United States, 34 Fed. Cl. 434 (1995).

C. Judicial Review Prohibited. Generally, an agency's decision to use or not use ADR is within the agency's discretion, and shall not be subject to judicial review. 5 U.S.C. § 581(b)(1).

1. However, arbitration awards are subject to judicial review under 9 U.S.C. § 10(b).

2. Section 10(b) authorizes district courts to vacate an arbitration award upon application of any party where the arbitrator was either partial, corrupt, or both.

VI. CONCLUSION.